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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

CHARLES W. CALHOUN and
DONNA K. CALHOUN,
husband and wife,

Petitioners,

v.

CITY OF DURANT, OKLAHOMA, and
OKLAHOMA MUNICIPAL LEAGUE, INC.,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1974, petitioners Charles and Donna Calhoun bought 51 acres of land near respondent City of Durant, Oklahoma, for the purpose of developing it as a residential subdivision. Four years later, the City took "unequivocal overt action" to initiate condemnation of all 51 acres in order to build a new municipal reservoir. This action had the immediate effect of destroying what the trial court found was the property's "only economically viable use." Due to the ever-impending-yet-never-quite-consummated condemnation, the Calhouns' property remained economically idle for some *12 years* until 1990, when the City at last instituted condemnation proceedings against 23 of the 51 acres and released the remaining 28 acres from any further threat of condemnation.

The state trial court found that because "the City denied [the Calhouns] economically viable use of the land" beginning in 1978, the City had permanently taken 23 acres and temporarily taken 28 acres of the Calhouns' property as of that date. Without rejecting the finding of "no economically viable use," the court below reversed, holding that the Calhouns could not have suffered a taking because their property had neither been physically invaded nor been subjected to "regulatory action" by the City. The question presented is

Whether deliberate government action that deprives property of all economically viable use effects a compensable taking in the absence of a formal regulatory restraint on the use of the property—a question on which the lower courts are divided.

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PETITION FOR WRIT OF CERTIORARI

Charles W. Calhoun and Donna K. Calhoun (Calhouns) respectfully petition for a writ of certiorari to review the judgment of the Oklahoma Court of Civil Appeals.

OPINIONS BELOW

The orders of the Oklahoma Supreme Court granting and then dismissing the Calhouns' petition for writ of certiorari are unreported; they appear at Appendices D and E to the petition. The opinion of the Oklahoma Court of Civil Appeals will soon be published in the *Pacific Reporter*; it appears at Appendix A to the petition. The relevant orders of the state trial court are unreported; they appear at Appendices B and C to the petition.

JURISDICTION

The judgment of the Oklahoma Court of Civil Appeals was entered on May 20, 1997. Petition Appendix (Pet. App.) at A-1. The Calhouns' timely petition for writ of certiorari in the Oklahoma Supreme Court was granted on December 18, 1997. Pet. App. at D-1. But in an order dated October 8, 1998, the Oklahoma Supreme Court dismissed the writ of certiorari as improvidently granted. Pet. App. at E-1. On December 16, 1998, Justice Breyer extended the time within which to file the present petition to and including February 8, 1999. No. A-491. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The essence of the Calhouns' claim is that they have suffered a compensable taking because the deliberate and targeted actions of the City deprived them of all economically viable use of their property in violation of the Fifth Amendment. As set forth below, the Oklahoma courts granted the fact that the Calhouns' property was deprived of economically viable use, but they nonetheless rejected the takings claim as a matter of law.

A. Factual Background

Charles Calhoun entered the real estate development business in 1967, and in 1974 the Calhouns purchased the 51 acres at issue in the present case "for the sole purpose of developing and selling rural homesites." Pet. App. at A-3. After taking possession of the property, the Calhouns "began surveying the lots and roads and advertising them for sale as the Lakewood Subdivision." *Id.* Two years later, respondent City of Durant (City) "began discussing the possibility of constructing a new water reservoir"; the Calhouns' property was discussed "as one of several alternative locations." *Id.* Another two years passed, and the City's focus narrowed greatly: in July of 1978, the City "issued an interim report of the project listing all of [the Calhouns'] 51 acres as part of the lake project." *Id.* The Calhouns do *not* contend that any of these activities by the City effected a taking of their property.

In September of 1978, however, the situation changed dramatically. In that month, "discussions" ended, and the City's plans lost their "interim" character. Within a week's time, the voters granted the City authority to issue bonds for the project,

and the City approved a multimillion dollar contract with an engineering firm to construct the reservoir. *See id.* When the City "adopted a detailed land acquisition policy" some months later, "*it was clear that* [*the*] *City intended to condemn all of* [*the Calhouns'*] *land.*" *Id.* at A-4 (emphasis added).

In this regard, the trial court found that "the City did more than merely propose future plans to build a lake and take [the Calhouns'] property—it took *unequivocal overt action*" to consummate those plans. *Id.* at B-5 (emphasis added). Specifically, the trial court found that the City

- "adopted enabling ordinances";
- "passed two bond and/or tax referendums";
- "issued bonds and collected taxes to build the project";
- "signed engineering contracts and paid monies thereon";
- "approved construction plans";
- "approved a written plan to take land owned by the [Calhouns] and others";
- "negotiated with many of these nearby landowners and purchased surrounding property pursuant to the plan";
- "directly notified [the Calhouns] that it intended to take their land, appraised it and made an offer to buy"; and
- "specifically told [the Calhouns] that it would condemn their entire 51 acres."

Id. at B-5 to -6. In short, beginning with the approval by the voters of the first bond proposal in September of 1978, the City of Durant "consistently, constantly and unequivoc[ally] undertook every overt action necessary to complete the lake project and take [the Calhouns'] land—short of actually filing a condemnation action to do so."[1]

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[1] In the cited passage, the trial court mistakenly identifies the date of the first bond election as June 15, 1979. In fact, the election was held on September 26, 1978, as indicated by an earlier passage of the trial court's order and by the opinion below. *See* Pet. App. A-3, B-2.

The effect of those overt actions on the Calhouns' 51 acres was immediate and devastating. As the trial court also specifically found, "the only economically viable use of the Calhoun property . . . was for a residential homesite subdivision." *Id.* at C-2. Not surprisingly, that use was completely destroyed when the City made clear its intention to put the land at the bottom of a lake. Nevertheless, the Calhouns did make efforts to salvage some use for their property; however, they were unsuccessful either in selling lots or in obtaining financing for their sale. *See id.* at A-4. Essentially, the cloud of "impending condemnation" prevented the Calhouns from the selling their property just as it also prevented potential "buyers from obtaining homeowner financing" in order to buy it. *Id.* at B-7.

Although the City commenced negotiations with many of the Calhouns' neighbors in 1979 and consummated a number of land purchases, the Calhouns were not even approached by the City until December of 1985. *See id.* at A-4. The Calhouns declined the City's first offer but subsequently attempted "to get the City to either make another offer, condemn [the] property, or state that [the City] no longer had an interest in it." *Id.* The authorized and intended condemnation, however, remained always "just around the corner": the consistent reply of City officials was that "they were going to condemn, but only after they had completed negotiations with the other landowners." *Id.* In other words, "despite repeated efforts by [the Calhouns] to have the City take some definitive action, the City refused, preferring to stay with" its own (ever-lengthening) timetable. *Id.* at B-6.

Finally, in March of 1989, the City enacted a resolution *threatening* to do what it had said it was going to do for the past decade—file condemnation actions against reservoir-related landowners who failed to sign a land sale contract within the next 90 days. *See id.* But even this threat was idle. The City did not file a condemnation action against the Calhouns' property until more than a year later, and even then not until after

the Calhouns—who were by then defendants in a foreclosure action brought by the bank that had financed the property—had filed the present inverse condemnation action against the City. *See id.* at A-4, C-2. Furthermore, despite having for 12 years identified the whole of the Calhouns' property as crucial to the reservoir project, the City sought condemnation of only 23 of the 51 acres. *See id.* at A-4. The parties agree that the remaining 28 acres were released from threat of condemnation at that time, and the Calhouns accordingly do not seek compensation with respect to those 28 acres for the period subsequent to the City's filing in April of 1990.

B. Trial Court Proceedings

The City sought to dismiss the Calhouns' action for failure to state a claim. The Calhouns opposed the City's motion to dismiss by arguing that their complaint "clearly states a claim upon which relief can be granted pursuant to the Fifth Amendment of the United States Constitution." Brief in Support of Objection to Motion to Dismiss at 4. The City's motion was denied and, after a bench trial, the trial court found the City liable for a compensable taking of the Calhoun's entire property. Having made the detailed factual findings set forth above, and having cited the Fifth Amendment and numerous decisions of this Court interpreting the Takings Clause, *see* Pet. App. at B-3 to -5, the trial court concluded that "the City denied [the Calhouns] an economically viable use of [their] land in an unreasonable manner," such that the City effected a compensable taking of the Calhouns' entire property, *id.* at B-7 (citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

In its later judgment, the court was more specific. It found a permanent taking of the 23 condemned acres beginning on September 26, 1978, the week in which the City (1) obtained authority to issue bonds to finance the reservoir project, and (2) approved a contract to construct the reservoir. The court also found a temporary taking of the remaining 28 acres beginning on that same date in 1978 and lasting nearly 12 years until

the City at long last filed its condemnation action. *See id.* at C-2. The City was ordered to pay compensation accordingly, namely, the fair market value of the 23 acres in 1978, together with interest from that date, plus the use value of the remaining 28 acres for 12 years, as measured by commercial interest rates from 1978 to 1990. *See id.* at C-2 to -3.

C. Appellate Proceedings

In defending their judgment on appeal, the Calhouns relied expressly on the Fifth Amendment as well as several of this Court's decisions, including *Agins*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See* Answer Brief of Appellees at 10-14, 18-20, 24. This defense was ultimately unsuccessful, however. While accepting the trial court's factual findings, the Oklahoma Court of Civil Appeals ruled against the Calhouns on purely legal grounds: "In the case at hand, the facts as found by the trial court and taken as true, do not support the legal conclusion that a taking occurred." Pet. App. at A-11; *accord id.* at A-12 ("The trial court erred as a matter of law in finding that a taking occurred under these facts.").

The appellate court's legal theory was relatively simple. Oklahoma courts "have generally recognized two basic grounds that support inverse condemnation actions: [1] physical taking and [2] the enactment of regulations that substantially impair the property's usefulness." *Id.* at A-8. Thus, the court very briefly discussed cases finding a "[p]hysical invasion," the first basis for inverse condemnation. *See id.* at A-9. The court then turned to the second basis, observing that "[r]egulation of a property's uses may also constitute a taking if the regulation (an overt act exercising dominion or control over the property) acts to destroy or impair the land's usefulness." *Id.* But what if, as in the present case, an owner seeks to establish a taking based on government actions that do not amount to a physical

invasion of the property and do not amount to a regulatory restraint on its use?

Well, that particular question had already been resolved by the Oklahoma Supreme Court a long time ago:

> [Our supreme court] in *Empire* answered "no" to the question whether "in the absence of an actual invasion of land, or of governmental interference with the owner's right to use the same, may inverse condemnation be maintained?"

Id. at A-10 to -11 (quoting *Empire Construction, Inc. v. City of Tulsa*, 512 P.2d 119, 123 (Okla.), *cert. denied*, 414 U.S. 1094 (1973)). Thus, it was legally irrelevant that the Calhouns had been deprived of "economically viable use of [their] land" by the City's "unequivocal overt action." *Id.* at B-5, B-7. Despite this uncontroverted fact, then, the court below found no taking in the present case merely because "[t]here was no *physical invasion* of Calhoun's land and there was no *regulatory action* taken by the City." *Id.* at A-11 (emphasis added).

One judge concurred "with the result under the specific circumstances of this case" but rejected the majority's holding that in *no* circumstances can a taking "occur absent physical invasion or enactment of regulations that substantially impair the property's usefulness." *Id.* at A-13 (Hansen, J. concurring in the judgment). Ultimately, the appellate court remanded the case with instructions to enter judgment for the City. *See id.*

The Calhouns filed a petition for certiorari with the Oklahoma Supreme Court, arguing that they had been "denied all viable economic use of [their] property *in violation of the Fifth Amendment* and Art. II, § 24 of the Oklahoma Constitution." Petition for Certiorari at 5 (emphasis added). Originally, the state supreme court granted the petition. *See* Pet. App. at D-1. On October 8, 1998, however, the court dismissed the writ of certiorari as improvidently granted, perhaps because the issue was already settled by its decision in *Empire Construction*. *See*

id. at E-1. On December 16, 1998, Justice Breyer granted the Calhouns' application to extend the time within which to file the present petition to February 8, 1999. *See* No. A-491.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Oklahoma courts, as exemplified by the court below, have decided a question of federal takings law in a way that conflicts with the decisions of several United States courts of appeals and state courts of last resort. As testified by length, breadth, and depth of the split in the lower courts, the question whether deliberate government action depriving property of all economically viable use effects a compensable taking in the absence of a formal regulatory restraint on the property is an important one. Moreover, while this Court has hinted at a resolution of the issue in favor of property owners, the Court has never actually faced the issue squarely. The present case, arriving here with detailed factual findings by a trial court, coupled with an appellate decision based solely on legal grounds, provides a virtually perfect vehicle for finally addressing and resolving the issue.

I

ON THE QUESTION PRESENTED, THE DECISIONS OF THE OKLAHOMA COURTS ARE IN CONFLICT WITH THE DECISIONS OF NUMEROUS FEDERAL AND STATE COURTS

In holding that the Takings Clause excludes the possibility of a compensable taking in the absence of an actual physical invasion of land or of regulatory interference with an owner's right to use land, the Oklahoma courts are not alone. *See, e.g., City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895, 904 (N.Y. 1971) (rejecting "the idea that there can be a de facto taking in the absence of a physical invasion or direct legal restraint"); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 453 (Tex. 1992) (joining those courts holding that government's "publicly targeting a property for condemnation, resulting in economic damage to

the owner, generally does not give rise to an inverse condemnation action *unless there is some direct restriction on use of the property*" (emphasis added) (citing, *inter alia*, decision of the Oklahoma Supreme Court in *Empire Construction*)).

Nonetheless, numerous decisions by both federal and state appellate courts have reached exactly the opposite answer to the question presented. We detail this conflict below.

A. Federal Courts

1. Sixth Circuit

The Sixth Circuit has a venerable history of finding compensable takings of property in circumstances under which the Oklahoma courts exclude even the possibility of a taking. In *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), the district court found that the City "engaged in an unconstitutional *course of conduct* which deprived plaintiffs of their private property without just compensation." *Id.* at 791 (emphasis added). That is, as part of a massive "urban renewal" project, "the City engaged in several activities designed to force residents in the southeast section of Dearborn to sell their property to the City." *Id.* at 795.[2] Having so found, the court held that "although none of the City's activities alone may have constituted a taking of private property, the combination of the City's actions resulted in a taking for which just compensation is due." *Id.* at 796. The Sixth Circuit affirmed this holding, rejecting as "without merit" the City's argument that a "taking cannot occur in the absence of condemnation proceedings or a physical intrusion." *Id.*

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[2] Although some of the activities did touch on the City's regulatory power—such as "causing unreasonable delay in the issuance of" building permits, repair permits, and occupancy permits—most of the activities had a distinctly *non-regulatory* character: verbally discouraging permit applicants, making statements in meetings, issuing press releases, posting signs, and leaving acquired property vacant and unprotected. *See id.*

In reaching this conclusion, the court acknowledged that "the mere decline in property values does not, per se, constitute a taking requiring compensation." *Id.* (citing *Danforth v. United States*, 308 U.S. 271, 285 (1939)). Yet "governmental action short of acquisition may constitute a constructive taking 'if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter.'" *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). That deprivation can occur in the absence of physical invasion or formal regulatory restraint if the government's "deliberate course of conduct cause[s] . . . substantial damage to plaintiffs' properties." *Id.* at 798. This holding is in stark contrast to the holding of the court below, which found no taking despite the City of Durant's deliberate and "unequivocal overt action" that "amounted to a substantial impairment of [the Calhouns'] property interest." Pet. App. at B-5, B-7.

In *Amen*, the Sixth Circuit relied on *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968). In *Foster*, the City announced condemnation proceedings against various properties as part of an urban renewal project; held those proceedings in abeyance for 10 years, during which the properties were vandalized and rendered unrentable as a result of the city's actions; and then revived the proceedings (and acquired the property on the cheap) after the owners were forced to raze their buildings. *See Amen*, 718 F.2d at 796. On these facts, *Foster* held that "the actions of the City constituted an unconstitutional taking of property *before the actual condemnation of the property occurred*." *Id.* at 796-97 (emphasis added). The Sixth Circuit since has recognized that in *Foster*, it *rejected* decisions holding that "there can be no taking until the condemnation process is completed." *Sayre v. City of Cleveland*, 493 F.2d 64, 69 (6th Cir.), *cert. denied*, 419 U.S. 837 (1974)). Quoting—and rejecting—the opinion of the New York Court of Appeals in *J.W. Clement Co.*, 269 N.E.2d at 903, the Sixth Circuit observed that "[t]he rationale of these cases is that a de facto taking 'requires a *physical* entry by the

condemnor, or a *physical* ouster of the owner, or a *legal* interference with the physical use, possession or enjoyment of the property or *legal* interference with the owner's power of disposition of the property.'" *Sayre*, 493 F.2d at 70 (emphasis added).

This observation by the Sixth Circuit is particularly useful in highlighting the conflict between the federal courts and the Oklahoma courts on the question presented. The Sixth Circuit's *rejection* of the notion that a taking requires a "physical entry" or a "legal interference" cannot be reconciled with the Oklahoma Court of Civil Appeals' *acceptance* of the notion that a taking requires a "physical invasion" or a "regulatory action." Pet. App. at A-11. Moreover, while the Sixth Circuit has expressly *rejected* the New York Court of Appeals' decision in *J.W. Clement Co.*, the Oklahoma Supreme Court *relied* on that decision in holding that there can be no taking in the absence of a physical invasion or a regulatory restriction. *See Empire Construction Co.*, 512 P.2d at 123; *see also* Pet. App. at A-11 (noting this reliance).

2. Ninth Circuit

The Ninth Circuit is another court of appeal whose decisions make clear that a compensable taking of property can be effected without a physical invasion or a formal regulatory restraint. In *Richmond Elks Hall Association v. Richmond Development Agency*, 561 F.2d 1327, 1329 (9th Cir. 1977), the Agency crafted a downtown redevelopment plan and afterward "passed and recorded a resolution declaring the public use, purpose, and necessity for the acquisition by condemnation of all redevelopment area properties, including the [Elks'] property," a commercial building. When the leases between Elks and its tenants expired one year later, "Elks reasonably and justifiably understood that Agency would soon acquire its property, and thus refused to offer tenancies in excess of month-to-month." *Id.* Moreover, as "a direct result of the Agency's acquisition, demolition, and relocation program" in pursuit of its plan for

redevelopment, Elks' commercial tenants experienced a decline in sales and consequently vacated the property, reducing Elks' rental income by more than two-thirds. *Id.* Finally, the Agency entered into an option contract with a developer, agreeing to acquire the property of Elks and neighboring landowners in order to convey it to the developer to build a shopping center. *See id.* at 1330.

As a result of these *non-regulatory* activities by the redevelopment agency, the Elks property "became unsaleable in the open market and its use for its intended purposes became severely limited." *Id.* On such facts, the Ninth Circuit affirmed the district court's holding that "there was a compensable taking under the Fifth Amendment." *Id.* Citing the Sixth Circuit decisions discussed above, the Ninth Circuit held that when "a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid." *Id.* at 1330. This holding cannot be reconciled with the lower court's holding that the City of Durant's direct and substantial interference with the Calhouns' property rights in furtherance of a public project—an interference that significantly impaired the value of the property—did *not* result in a taking because there was not a physical invasion or a formal regulatory restraint.

Also in conflict with the decisions of the Oklahoma courts is the Ninth Circuit's decision in *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983). In that condemnation case, the parties valued the property in March of 1979, more than a year before the start of trial. *See id.* at 1334. When judgment was finally entered in December of 1980, the district court denied the property owner's motion for post-judgment interest; the owner appealed. Because "the Fifth Amendment makes interest available when a taking precedes payment," the Ninth Circuit was confronted

with the question, "when, if ever, did a taking occur?" *Id.* at 1333. Like the court below, the district court in *15.65 Acres* held that "the government had not yet taken the land because it had neither filed a declaration of taking nor entered into possession." *Id.* at 1334. (No federal regulatory restraint on the property's use was involved in the case.)

The Ninth Circuit reversed. The court of appeals recognized that when property "is intended for development and sale, and remains unimproved," the owner subject to condemnation proceedings "frequently loses more than just value; he may be deprived of all economic use of his land." *Id.* In such cases, "[t]he owner of unimproved land is . . . left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking." *Id.* The Ninth Circuit found this sufficient to constitute a taking:

> Under these circumstances, we hold it proper to invoke the rule that when the government deprives an owner of all economic use of his land, there has been a taking. In this case a virtual [i.e., constructive] ban on development and sale has been imposed that has rendered impossible any economic use of the 15.65 acres. We therefore hold that the land has been taken.

Id. (citation omitted).

It remained for the court to determine exactly when the taking occurred. Because the property owners were "without use or compensation" after the property was formally valued in March of 1979, the Ninth Circuit held that "the landowners are entitled to interest from . . . the date of valuation." *Id.* By contrast, though the Calhouns were "without use or compensation" ever since the City of Durant took "unequivocal overt action" against their property in September of 1978, the court below found no taking and no entitlement to interest as of that date. That judgment cannot be reconciled with *15.65 Acres*.

3. Eighth Circuit

In *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 786 (8th Cir.), *cert. denied*, 444 U.S. 899 (1979), the city adopted a downtown redevelopment plan and commenced condemnation proceedings against the property owner's leasehold interest in a commercial building. When the city later cancelled the project and abandoned the proceedings, the owner asserted a takings claim against the city, alleging that the city's actions had "destroy[ed] the economic value of the [redevelopment] district, leaving [the owner] under a 'cloud of condemnation' for five years and rendering [its] leasehold useless." *Id.* The district court dismissed the takings action for failure to state a claim, opining: "Plaintiff does not allege that there has been any *physical* entry or *legal* interference with its use or disposition of the property." *Id.* at 787. Relying on the Sixth Circuit's decisions in *Foster* and other cases and on the Ninth Circuit's decision in *Richmond Elks*, the Eighth Circuit reversed the dismissal, holding that the district court's reading of the Takings Clause was "too restrictive." *Id.* at 789.

Like the Sixth Circuit in *Amen*, *see supra* p. 10, the Eighth Circuit acknowledged that "initial steps authorizing condemnation, even if they result in a decline in property values, do not constitute a taking requiring compensation to the property owner. *Thomas W. Garland*, 596 F.2d at 787 (citing *Danforth*, 308 U.S. at 286). Yet "governmental action short of acquisition or occupancy may constitute a constructive or de facto taking 'if its effects are so complete as to deprive the owner of most or all of his interest in the subject matter.'" *Id.* (quoting *General Motors Corp.*, 323 U.S. at 378, and citing the Ninth Circuit's decision in *Richmond Elks*).

4. Federal Circuit

In *Drakes Bay Land Company v. United States*, 424 F.2d 574 (Ct. Cl. 1970), the Court of Claims found a compensable taking in the absence of either a physical invasion or a formal

regulatory restraint.[3] The property owner in that case (Drakes Bay) purchased a 468-acre tract on the Point Reyes peninsula north of San Francisco Bay "for the purpose of subdividing it and selling it in small lots or parcels." *Id.* at 576. To that end, Drakes Bay and other landowners formed a special assessment district having authority to construct an access road through the "Heims ranch" to link their contemplated subdivisions with an existing county highway. *See id.* at 580. While this process was underway, Congress enacted legislation establishing the Point Reyes National Seashore, a 53,000-acre area that encompassed the Drakes Bay tract. That legislation authorized the government to acquire all lands within the Seashore area by means of purchase, condemnation, or exchange; it expressed the intent of Congress that such acquisitions be accomplished as rapidly as funds became available. *See id.* at 575, 582. The first such acquisition was the purchase of the Heims ranch; that purchase effectively ended the efforts of the special assessment district to build a subdivision access road. *See id.* at 581, 585.

The Court of Claims affirmed the finding that, after the government purchased the ranch, "the private sale of real property within the boundaries of the Seashore almost completely ceased." *Id.* at 586. Accordingly, like the Calhouns, Drakes Bay "attempted to sell its land to private purchasers but to no avail." *Id.* Private parties were not interested "because of the well publicized threat of eventual condemnation of Seashore realty"; nor was the government interested, "because after having successfully thwarted [Drakes Bay's] subdivision plans, it realizes that [Drakes Bay] is a party who can be deferred interminably, and dealt with at pleasure." *Id.* Emphasizing that the activities of government officers "can effect takings without

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[3] The old United States Court of Claims, an appellate court, was succeeded by the United States Court of Appeals for the Federal Circuit on October 1, 1982. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 165, 96 Stat. 25, 50; *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc).

recourse to the usual machinery of land acquisition, that is, purchase or condemnation," and distinguishing the case from other cases that had "an element of actual physical invasion," the court found that the government's activities vis-à-vis Drakes Bay did effect "a taking." *Id.* at 584, 586. Moreover, although the court issued its decision in April of 1970, it held that the "date of taking" was the date of the government's refusal in the fall of 1963 to purchase the Drakes Bay tract after having purchased the Heims ranch. *See id.* at 585, 587-88.

In contrast to the Oklahoma courts, therefore, the Court of Claims found a compensable taking in the absence of a physical invasion or a formal regulatory restraint on the use of property. The basis for the taking in *Drakes Bay*, like the basis of the taking found by the trial court in the present case, was *non-regulatory* action of government directed at specific property with the effect of depriving the property of economically viable uses and reducing its value. In categorically excluding the possibility of a taking in these circumstances, the decisions of the Oklahoma courts stand in irreconcilable conflict with the decisions of the Federal Circuit and with the many other decisions of the federal courts of appeals discussed above.[4]

B. State Courts

Like their federal counterparts, state courts have also resolved the question presented here in a manner that conflicts with the decisions of the Oklahoma courts. The decision of the

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[4] Though decided nearly 30 years ago, *Drakes Bay* remains good law in the Federal Circuit. *See Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1559 (Fed. Cir. 1985) (relying on *Drakes Bay* in reversing dismissal of regulatory takings claim), *appeal after remand*, 926 F.2d 1169, 1173 (Fed. Cir.) (citing the case approvingly), *cert. denied*, 502 U.S. 952 (1991); *Benenson v. United States*, 548 F.2d 939, 947-48 (Ct. Cl. 1977) (finding regulatory taking in part because owners' situation was "substantially similar" to situation in *Drakes Bay*); *Althaus v. United States*, 7 Cl. Ct. 688, 694-96 (1985) (relying on *Drakes Bay* in finding regulatory taking of undeveloped property).

New Jersey Supreme Court in *Washington Market Enterprises v. City of Trenton*, 343 A.2d 408 (N.J. 1975), is probably the clearest in this regard. That case, like this petition, presented the question "whether there can be taking of property for which the Constitution demands just compensation, absent a *physical invasion* of the property or a *direct legal restraint* on its use." *Id.* at 409 (emphasis added). The New Jersey Supreme Court answered this question in the affirmative, holding that "where the threat of condemnation has had such a substantial impact as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution." *Id.* at 416.[5]

Accordingly, the court remanded the case with instructions to award the property owner takings damages if it could "show that there has been substantial destruction of the value of its property and that defendant's activities have been a substantial factor in bringing this about." *Id.* at 416. The New Jersey Supreme Court has continued to adhere to *Washington Market*'s reading of the Takings Clause. *See Township of West Windsor v. Nierenberg*, 695 A.2d 1344, 1356 (N.J. 1997). The court below, however, expressly declined to follow *Washington Market*, deeming the New Jersey decision "inconsistent with current Oklahoma law." Pet. App. at A-9 n.2.

As set forth at pp. 10-11 above, the Sixth Circuit in *Foster* held that certain non-regulatory activities of the City of Detroit effected a compensable taking of property prior to actual condemnation. The Michigan Supreme Court reached the same conclusion in the case of *In re Urban Renewal, Elmwood Park Project*, 136 N.W.2d 896, 900 (Mich. 1965). The Michigan courts have consistently applied *Foster* and *Elmwood Park* to

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[5] Having expressly cited the Fifth Amendment and having relied on interpretations of that constitutional provision by this Court and by the Sixth Circuit, *see id.* at 413-16, the New Jersey Court undoubtedly meant "the Constitution" to signify (or at least to include) the United States Constitution.

hold that "governmental actions can constitute a de facto taking or inverse condemnation prior to the time eminent domain proceedings are instituted." *In re Acquisition of Land, Virginia Park*, 328 N.W.2d 602, 605 (Mich. Ct. App. 1982). Therefore, an owner's "loss of revenue and inability to rent his property" would establish a taking, "assuming that he can establish the causal connection between his loss and the City's actions in carrying out its urban renewal programs." *Heinrich v. City of Detroit*, 282 N.W.2d 448, 450 (Mich. Ct. App. 1979); *see also Standard Industries v. Department of Transportation*, 454 N.W.2d 417, 419 (Mich. Ct. App. 1990) (holding that certain governmental actions may "amount to a de facto taking prior to an actual eminent domain proceeding"); *Board of Education v. Clarke*, 280 N.W.2d 574, 508 (Mich. Ct. App. 1979) (same).[6]

The court below held that "where a landowner's possessory rights were not disturbed, eminent domain proceedings may be abandoned [at any time] without subjecting the condemning authority to an award of damages" for a compensable taking. Pet. App. A-12. Just two months ago, a Connecticut court held precisely the opposite: "There is a de facto taking of property if property rights are impaired by an authority that failed to exercise its power of eminent domain, with damages for the taking to be ascertained as of the date of the taking." *Citino v. Redevelopment Agency*, 1998 WL 858532, at *9 (Conn. App. Ct. Dec. 15, 1998) (relying on *Foster* and *Washington Market*, among other cases). The "impairment" need not result from a regulatory restraint; instead, the test is "whether the property no longer has any reasonable and proper use and whether the economic utilization of the land has been, for all *practical* purposes, destroyed." *Id.* (emphasis added).

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[6] Though not immediately apparent on their face, the cited decisions of the Michigan courts rested on their interpretations of *federal* law. For example, those decisions consistently rely on federal cases interpreting and applying the Fifth Amendment, particularly the Sixth Circuit's decision in *Foster*.

In similar fashion, the court in *614 Co. v. Minneapolis Community Development Agency*, 547 N.W.2d 400, 408 (Minn. Ct. App. 1996), held that a property owner could establish a compensable taking even though it "could not prove that the city imposed regulations that expressly curtailed [the owner's] freedoms to make investments in the property." Rather, the owner stated a federal takings claim simply by alleging that "its uses were 'radically curtailed' by [the city's] actions; and that the precondemnation development activity 'inhibited' and even 'precluded' [the] economically viable use of its property." *Id.*

On the question presented, therefore, the decisions of the Oklahoma courts and of the courts of several other states are in undeniable conflict with the decisions of numerous federal and state courts. That conflict regarding an important question of federal takings law warrants this Court's intervention.

II

THIS COURT HAS ADDRESSED—BUT NEVER DEFINITIVELY RESOLVED—THE IMPORTANT QUESTION PRESENTED, AND THIS CASE IS AN EXCELLENT VEHICLE FOR DOING SO

On several occasions, this Court has made passing statements that bear on the question presented. In its most recent treatment, the Court even observed that the arguments in favor of resolving the question in favor of property owners are compelling. Nevertheless, the Court has never definitively resolved whether deliberate government action that deprives property of all economically viable use effects a compensable taking in the absence of a formal regulatory restraint on the use of the property. As explained below, the Calhouns submit that the present case provides an excellent vehicle for resolving the question and for ending the longstanding conflict in the lower courts.

In *Danforth v. United States*, 308 U.S. 271, 286 (1939), the Court stated that "[t]he mere enactment of legislation which authorizes condemnation of property cannot be a taking." But

of course, this "mere enactment" rule does not resolve the question that has divided the lower courts. Indeed, several of the decisions discussed above have explicitly acknowledged this rule from *Danforth*, even as they hold that there *can* be a taking in the absence of a physical invasion or a formal regulatory restraint. *See, e.g. Amen*, 718 F.2d at 796; *Thomas W. Garland*, 596 F.2d at 787.

Also in this category is the Court's brief mention of the matter in a footnote in *Agins v. City of Tiburon*, 447 U.S. 255 (1980): "Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay [in the condemnation of property], are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Id.* at 263 n.9 (quoting *Danforth*, 308 U.S. at 285). The "mere fluctuations in value" rule gets us little closer to the answer, however. The question presented regards government actions that have far more substantial impact on the property owner, namely, actions that *deny all economically viable use of land.* Moreover, the first case cited by the *Agins* footnote in support of the quoted proposition was the Eighth Circuit's decision in *Thomas W. Garland.* As set forth at p. 14 above, that decision *rejected* the notion that a property owner must "allege that there has been any *physical* entry or *legal* interference with its use or disposition of the property" in order to establish a compensable taking. 596 F.2d at 787.

This Court's first serious, if ultimately inconclusive, treatment of the question presented came in *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984). There, the Court ruled that for purposes of "straight-condemnation proceedings" brought pursuant to 40 U.S.C. § 257, "a taking does not occur until the *termination* of [the] proceedings," when the government tenders payment. 467 U.S. at 12 (emphasis added). The petitioner condemnee, who sought interest from an earlier date, argued that this reading of the statute was precluded by the Takings Clause:

> Petitioner contends that, at least when the subject of a straight-condemnation proceeding is unimproved land, the owner is effectively deprived of all of the significant interests associated with ownership long before the Government tenders payment. The filing of a complaint in condemnation and a notice of lis pendens, petitioner contends, has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or [from] selling it to another private party. At the same time, the owner remains liable for property taxes. Such a thoroughgoing abrogation of the owner's rights, petitioner submits, surely constitutes a taking as soon as the abrogation is effective, regardless of when the land is officially appropriated under the terms of the statute.

Id. at 13 (footnote omitted).

This argument is a fair approximation of the type of reasoning accepted and employed by those federal and state courts whose decisions are in conflict with the Oklahoma courts. How did this Court respond to the argument? Quite favorably—as a legal matter: "If petitioner's depiction of the impairment of its beneficial interests during the pendency of condemnation suit were accurate, *we would find its constitutional argument* ***compelling***." *Id.* at 13-14 (emphasis added). The Court then explained why the argument was legally compelling:

> We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived "an owner of *economically viable use* of

> his land." And we have suggested that, under some circumstances, a land-use regulation that severely interfered with an owner's "*distinct investment-backed expectations*" might precipitate a taking.

Id. at 14 (emphasis added) (quoting first *Agins*, 447 U.S. at 260, and then *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

Thus was the Court's description of the applicable *law*. As a matter of *fact*, however, the *Kirby Forest* Court found no "interference with petitioner's property interests severe enough to give rise to a taking under the foregoing theory." *Id.* at 14-15. Accordingly, because the petitioner "failed to demonstrate that its interests were impaired in any constitutionally significant way" before it received payment for its land, *id.* at 16, the Court did not issue a definitive ruling on the legal issues raised by the petitioner's argument. Rather, the Court chose to "defer resolution of those questions to a case in which they are fairly presented." *Id.* n.26.

This is that case. It arrives here with detailed factual findings by a trial court, including the court's finding that the City's "unequivocal overt action" in targeting the Calhouns' property for condemnation "denied [them] an economically viable use of the land." Pet. App. at B-5, B-6. These findings were accepted by the court below, which resolved the issue "as a matter of law" in an opinion that expressly found the relevant decisions of other state courts to be "inconsistent with current Oklahoma law." *Id.* at A-9 n.2, A-12. In addition, as exemplified by the less-than-two-month-old decision of the Connecticut Appellate Court in *Citino v. Redevelopment Agency*, 1998 WL 858532 (Conn. App. Ct. Dec. 15, 1998), the question presented is a live one and the conflict a continuing one. *Compare id.* at *9 (holding that there is a compensable taking "if property rights are impaired by an authority that failed to exercise its power of eminent domain, with damages for the taking to be ascertained as of the date of the taking") *with* Pet. App. A-12 (holding that

"where a landowner's possessory rights were not disturbed, eminent domain proceedings may be abandoned [at any time] without subjecting the condemning authority to an award of damages" for a compensable taking).

Finally, in addition to *Kirby Forest*, several this Court's takings precedents strongly indicate that the Oklahoma courts are on the wrong side of the conflict. Thus, although *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), deals on one level with a formal regulatory restraint (a prohibition on building beachfront homes), the decision also speaks broadly to the question presented here. Setting forth the justification for the rule that "the Fifth Amendment is violated when land-use regulation . . . *denies an owner economically viable use of his land*," *Lucas* affirmed Justice Brennan's observation that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1016, 1017 (citing *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (dissenting opinion). For present purposes, one may reasonably add that this proposition is equally true whether the "total deprivation" stems from a formal regulatory restraint (as in *Lucas* itself) or instead results from the deliberate and targeted actions of government agencies with the power of condemnation (as in the present case).

Lucas also grounded the "economically viable use" rule on "the fact that regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them the heightened risk that private property is being pressed into some form of public service under the guise of" advancing a worthy public purpose. *Id.* at 1018. Again, *Lucas* affirmed Justice Brennan's observation that "[f]rom the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation." *Id.* (quoting *San Diego Gas*, 450 U.S. at 652 (dissenting opinion)). As the present case demonstrates, one

can justifiably say that from the government's point of view, the benefits to the public from threatened-but-unconsummated condemnation may be equally great as from actually consummating the condemnation.

In the present case, for example, had the City of Durant condemned the Calhouns' property in 1978 or 1979 in accordance with the City's clearly evident intentions, it would have preserved that property as undeveloped, thereby smoothing its conversion to use as a public reservoir, and also ensured that the property was immediately available when construction of the reservoir began in 1990. Yet, by employing the simple yet devastatingly effective device of "consistently, constantly, and unequivoc[ally]" restating its intention and ability to condemn the Calhouns' property, Pet App. at B-6, the City was able to achieve these public benefits *without* actually having to consummate the condemnation (and pay constitutionally mandated compensation).

In general, where undeveloped land is involved, the government will often have the ability—wholly apart from formal regulation—to freeze development, and thereby set aside the land for later-intended public use while at the same time keeping the ultimate acquisition price as low as possible. *See, e.g., Drakes Bay*, 424 F.2d at 585-86, *discussed at supra* pp. 14-16. In other cases, the government may be able to go even further and affirmatively *reduce* the value (and therefore the acquisition price) of the targeted property. *See, e.g., Amen*, 718 F.2d at 796 (describing *Foster* case), *discussed at supra* pp. 10-11. Just as much as formal regulation, then, targeted precondemnation activities that leave a landowner without economically viable use carry a heightened risk that private property is being pressed into public service under the guise of, for example, allowing a government agency to "retain a certain amount of flexibility in implementing its [public works] projects." Pet. App. at A-7.

In short, the same "good reasons" that justify the finding of a compensable taking "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good" through formal regulation, *Lucas*, 505 U.S. at 1019, also justify the finding of a compensable taking when the landowner is "called upon" to leave his property economically idle through non-regulatory activities deliberately targeted at the property.

Like both *Kirby Forest* and *Lucas*, the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), is also relevant to the question presented. *First English* repudiated the California Supreme Court's doctrine disallowing monetary compensation for temporary regulatory takings, a doctrine based in part on "the need for preserving a degree of freedom in the land-use planning function." *Id.* at 317 (quoting *Agins v. Tiburon*, 598 P.2d 25, 31 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980)). This same "need" is often advanced as a justification for disallowing compensation for targeted precondemnation activities. *See, e.g.*, Pet. App. A-7 ("A city must retain a certain amount of flexibility in implementing its projects, even after money is earmarked."); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 453 (Tex. 1992) ("[I]mposition of liability for precondemnation activities would tend to inhibit free and open discussion of proposed public improvements . . . . After announcing a project, the government would be under pressure to acquire the needed property as quickly as possible to avoid or minimize liability.").

The Court in *First English* was "not unmindful of these considerations" but held that "they must be evaluated in light of the command of the Just Compensation Clause." 482 U.S. at 317. Accordingly, while recognizing that "the government may elect to abandon its intrusion or discontinue regulations" (or, we might add, terminate a proposed public works project), that freedom does not resolve "whether abandonment by the government requires payment of compensation for the period

of time during which" private property interests were invaded. *Id.* at 317, 318. In *First English*, the Court did finally resolve that question—in favor of the property owner. So, too, should the Court grant review and resolve essentially the same question applied to somewhat different circumstances.

In considering the significance of the question presented by the present case, it is worth reflecting on the experience of property owners in the City of Detroit. No doubt with the best of intentions, that city engaged in a series of massive "urban renewal" projects over the past half century. As chronicled in numerous opinions of federal and state courts, these projects began with the "Mich. 1-11 area" project in 1949 and continued with the "Elmwood Park Rehabilitation Project #1" in 1959, the "Elmwood Park Rehabilitation Project #2" in 1961, the "University City Rehabilitation Project" in 1962, the "Virginia Park area" renewal project in 1969, and an airport expansion project in 1987.[7] As further chronicled in these opinions, this urban "renewal" was, in at least one respect, a misnomer: in carrying out their various projects, city officials left behind a trail of urban *destruction* that devastated many property owners. *See, e.g., Foster*, 405 F.2d at 140 ("[T]he area involved became decayed and 'blighted' and property values declined as a result of the city's condemnation action. That such occurred is not challenged on appeal, and its truth is obvious.").

One district court rightly observed that if federal takings law were as then conceived by the City of Detroit—and as now conceived by the Oklahoma courts—"condemning authorities could deprive thousands of property owners of the 'just compensation' to which they are entitled." *Foster*, 254 F. Supp. at 663. Property owners in Michigan were fortunate that federal

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[7] In addition to decisions discussed at pp. 10-11, 17-18 above, see *Hart v. City of Detroit*, 331 N.W.2d 438, 441 (Mich. 1982); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 368-69 (E.D. Mich. 1970); and *Fruman v. City of Detroit*, 1 F. Supp. 2d 665, 668-69 (E.D. Mich. 1998).

and state courts there had the judicial fortitude to review the City of Detroit's actions "in light of the command of the Just Compensation Clause." *First English*, 482 U.S. at 317. This Court should grant the petition case and compel the Oklahoma courts to do likewise.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: February, 1998.

Respectfully submitted,

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APPENDIX

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Appendix A-1

Filed 5/20/97

RELEASE FOR PUBLICATION BY ORDER OF
COURT OF CIVIL APPEALS
IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA

DIVISION I

CHARLES W. CALHOUN and DONNA KAY CALHOUN, husband and wife,	)	
Plaintiffs/Appellees,	)	
vs.	)	No. 85,802
THE CITY OF DURANT, an Oklahoma municipality,	)	
Defendant/Appellant,	)	
and	)	
THE FIRST NATIONAL BANK IN DURANT,	)	
Defendant.	)	

APPEAL FROM THE DISTRICT COURT OF
BRYAN COUNTY, OKLAHOMA

HONORABLE DOUG GABBARD, II, JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

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Durant, Oklahoma,
and
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Diane Pedicord,
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OPINION

Opinion by Kenneth L. Buettner, Judge:

¶1 Charles W. and Donna Kay Calhoun (Calhoun) filed an inverse condemnation suit against the City of Durant which was tried to the court in two phases.[1] The court first determined that an inverse condemnation, or taking, had occurred. In the second phase, the court decided the time of the taking and

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[1] "Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. [] Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" (Citations omitted.)

Agins v. Tiburon, 447 U.S. 255, 258, n.2, 100 S.Ct. 2138, 2140, n.2, 65 L.Ed.2d 106 (1980).

damages. The trial court made extensive findings of fact relative to the first issue which are necessary for a complete understanding of the appellate issues. Pertinent findings included the following:

> In 1967, the Plaintiff Charles Calhoun entered the Durant real estate development business and became involved in, among other ventures, the Twin Oaks Subdivision. In 1974, Plaintiffs purchased the 51 acres involved in this case from Mr. and Mrs. Billy Ray Ragle for the sole purpose of developing and selling rural homesites. During their discussions, Ragle informed Plaintiff of a rumor that Defendant City was interested in building a new city lake somewhere in the area. The parties discussed how this could increase the value of homesites, especially if the property was lakeside. Calhoun did not know about any city lake plan, but was aware of an ASCS plan to build a lake at one of 30 alternative locations, one of these being near this property. Calhoun took possession of the land and began surveying the lots and roads and advertising them for sale as the Lakewood Subdivision.
>
> In 1976, the Defendant City began discussing the possibility of constructing a new water reservoir. Plaintiffs' property was listed as one of several alternative locations. In July 1978, Defendant City issued an interim report of the project listing all of Plaintiffs' 51 acres as part of the lake project. However, the Defendant City had financing problems that had to be resolved before a lake project could begin. On September 26, 1978, Defendant City held an election which resulted in passage of a bond proposal to finance the lake. On October 3, 1978, the City Council passed Resolution No. 1001 which approved an engineering contract with Benham-Blair Assoc. for its construction. When, on June 15, 1979, Defendant City

adopted a detailed written land acquisition policy, it was clear that City intended to condemn all of Plaintiffs' land. Negotiations began with many of Plaintiffs' neighbors and some land purchases were consummated. However, Plaintiff was not contacted by the City for another 6 years.

After June 1979, planning, engineering and other work on the project was slow. In 1985, Defendant City realized that additional financing would be necessary to build the project. Another election was held which resulted in passage of an additional sales tax to finance construction. On December 20, 1985, the City finally made its offer to purchase all of Plaintiff's 51 acres. Plaintiffs rejected this offer. Plaintiff testified that, on several occasions, he attempted to get the City to either make another offer, condemn his property, or state that they no longer had an interest in it. He says that their reply was that they were going to condemn, but only after they had completed negotiations with the other landowners.

On March 14, 1989, the City Council passed Resolution No. 1163 authorizing the filing of a condemnation action against any landowner who failed to sign a land sale contract by June 15, 1989. On October 16, 1989, Plaintiffs filed this case alleging that the City had taken his 51 acres by inverse condemnation action. Thereafter, in 1990, Defendant City filed its own condemnation action seeking condemnation of only 23 acres. The parties agree that the Defendant City sought all of Plaintiffs' property until the 1990 lawsuit was filed. The evidence is not clear as to whether construction had begun prior to the filing of this action; however, the parties agree that there was no increased waterflow over Plaintiffs' land until after the filing.

STANDARD OF REVIEW

¶2 A condemnation action "brought to obtain private property for public use is a special proceeding and not a civil action, to be carried out in accordance with the methods prescribed by the legislature." *Graham v. City of Duncan*, 354 P.2d 458 (Okla. 1960) (syllabus by the court). The Oklahoma Supreme Court has stated that an "action in condemnation is a special proceeding and strictly controlled by the constitution and statutes." *Carter v. City of Oklahoma City,* 1993 OK 134, 862 P.2d 77, 80. In eminent domain actions, it is clear that the issue of damages is triable to a jury. 27 O.S. 1991 §2; 66 O.S. 1991 §55; 69 O.S. 1991 §1203(e)(1). However, the determination of the character of use is a question for the court. Oklahoma Constitution, Art. 2, §24; 66 O.S. 1991 §57. Also see *Board of County Com'rs of Creek County v. Castell,* 522 P.2d 608, 610 (Okla. 1974) (necessity of taking is question for the court); *Gaylord v. State ex rel. Dept. of Highways*, 540 P.2d 558, 561 (Okla. 1975) ("whether construction of a frontage road and elimination of access to a highway constitutes a 'taking' requiring compensation is a question of law for the court, not a question of fact for a jury"); *Cunningham v. State ex rel. Oklahoma Planning and Resources Board*, 277 P.2d 990 (Okla. 1954) (questions of fact as to reasonable necessity of taking and character of use of land sought to be taken, determined by court, will not be disturbed unless clearly against weight of evidence).

¶3 With respect to inverse condemnation cases, the Supreme Court, in *Henthorn v. Oklahoma City*, 453 P.2d 1013, 1016 (Okla. 1969), held that "the question of a taking in inverse condemnation under Section 24, Art. 2, Constitution is one for the jury in cases involving an impairment of right of ingress and egress to property by the building of a railroad track in or across a street bordering the property." *Henthorn v. Oklahoma City*, 453 P.2d 1012, 1016 (Okla. 1969). In support of this holding, the court cited *Foster Lumber Co. v. Arkansas Valley*

and W.Ry.Co., 20 Okl. 583, 95 P. 224 (1908), on rehearing 100 P.1110 (1909), and *Atchison, T. & S.F. Ry. Co. v. Terminal Oil Mill Co.*, 180 Okla. 496, 71 P.2d 617 (1937). These cases dealt with the narrow issue of whether a taking occurs when a railroad materially impairs a landowner's access to a public street.

¶4 In *Henthorn*, the court extended the concept by holding that there can be a "taking" of private property by airplane flights which are over or in close proximity to land when such flights are continuous, frequent and low enough to constitute a substantial interference with use and enjoyment of property. The question of whether a continuing interference is substantial enough to constitute a "taking" is ordinarily a question for the jury. Also see *Mattoon v. City of Norman*, 1980 OK 137, 617 P.2d 1347, 1349 ("The question of substantial interference is one that the trier of facts must decide," citing *Henthorn*.); *State ex rel. Department of Transportation v. Hoebel*, 594 P.2d 1213, 1215 (Okla. 1979) (it is for jury to decide under facts presented whether taking is present).

¶5 Because both the preliminary question in inverse condemnation, whether there is a taking, and the subsequent question, the amount of damages if a taking occurred, are both triable to a jury, we review the conclusions reached by the trial court, insofar as its fact-finding, with the same deference we afford a verdict rendered with a well-instructed jury. Consequently, we will not disturb the findings of fact of a court or jury in an inverse condemnation action "if supported by any competent evidence." *Corbell v. State ex rel. Department of Transportation*. 1993 OK CIV APP 45, 856 P.2d 575, 579 (cert. denied).

¶6 On the other hand, questions of law are reviewable *de novo* by the appellate court which "claims for itself plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluver v. Weatherford Hospital Authority*, 1993 OK 85, 859 P.2d 1081, 1084 (hospital's status as a true public trust was a question of law).

DISCUSSION

¶7 The issue to be decided is whether the trial court erred when it found that a "taking" of Calhoun's property occurred September 26, 1978. This is the date that city voters passed a proposal authorizing the issuance of bonds to expand the water treatment system. Calhoun argues that the bond issue included four projects: expansion of the water treatment plant, a water transmission line, a raw water pumping facility and land acquisition for the Little Blue River reservoir. It is undisputed that the bond issue provided that 70% of the funds would be used on the water treatment plant and the transmission line. See 62 O.S. 1991 §574(A). Calhoun then argues that the remaining 30% of the bond issue must have been intended to be used for the pumping facility and to purchase land for the reservoir.

¶8 The decision that a taking occurred when the bond issue was approved by the voters is inconsistent with Oklahoma law. As demonstrated by *Empire Construction, Inc. v. City of Tulsa*, 512 P.2d 119 (Okla. 1973), *cert.* denied, 414 U.S. 1094, 94 S.Ct. 725, 38 L.Ed.2d 551 (1973), a city may put plans on the drawing board and change the plans years later. Even if land acquisition costs had been specifically included in the bond proposal, we could not say that City was then bound to acquire all of the land necessary for the Little Blue River reservoir simply because voters had authorized the sale of bonds for such purpose. "The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail" *Danforth v. United States*, 308 U.S. 271, 286, 60 S.Ct. 231, 237, 84 L.Ed. 240 (1939).

¶9 A city must retain a certain amount of flexibility in implementing its projects, even after money is earmarked. In this case, City could have abandoned the reservoir project, as City suggests occurred between 1985 and 1989, or it could have found that land acquisition costs at the primary site had become

prohibitive. *Board of County Com'rs of Pontotoc County v. Rayburn*, 192 Okl. 624, 138 P.2d 820 (1943).

¶10 Future plans which include a landowner's property in a public use project are not sufficient to bring an inverse condemnation action. *April v. City of Broken Arrow,* 1989 OK 70, 775 P.2d 1347, 1353. "[T]he constitution measures a taking of property not by what a state says, or what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298, 88 S.Ct. 438, 443 19 L.Ed.2d 530 (1967). Stated otherwise, there can be no taking if the city's assertion of dominion and control over the property is "not so substantial of an interference so as to effectively destroy or impair the land's usefulness." *Morain v. City of Norman*, 1993 OK 149, 863 P.2d 1246, 1249.

¶11 The Oklahoma Constitution provides in Article 2, §24 that "[p]rivate property shall not be taken or damaged for public use without just compensation." In the case at bar, the dispositive question is whether, based on the facts as found by the trial court, a taking occurred so as to expose City to liability for justly compensating Calhoun. The pertinent facts are that City planned to construct a lake and those plans included condemning Calhoun's property to accomplish the project. From the time the plans were first announced until Calhoun filed his inverse condemnation action, more than ten years passed. However, the parties have not cited nor have we been able to find, any Oklahoma authority that mere passage of time in a project's life can constitute a taking of property. Courts have generally recognized two basic grounds that support inverse condemnation actions: physical taking and the enactment of regulations that substantially impair the property's usefulness.[2]

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[2]Calhoun cites cases from other jurisdictions that have considered unreasonable delay or oppressive conduct as factors in determining whether a de facto taking has occurred. See, e.g., *Washington Market*

(continued...)

¶12 Physical invasion of the landowner's property may constitute a taking if it is severe enough to "effectively destroy or impair the land's usefulness." *State ex rel. Department of Transportation v. Hoebel,* 594 P.2d 1213, 1215 (Okla. 1979). In the *Hoebel* case, the landowner was allowed to continue his suit for inverse condemnation of his land due to flooding she alleged was caused by the State's nearby highway construction. In *Henthorn v. Oklahoma City*, 453 P.2d 1013 (Okla. 1969), the Supreme Court held that low, continuous and frequent airplane flights may be a "taking" if they constitute a substantial interference with the use and enjoyment of the property. The flights, causing noise, vibrations and other interferences, were a physical invasion of the property amounting to a taking of an air easement, which was subject to compensation.

¶13 Regulation of a property's uses may also constitute a taking if the regulation (an overt act exercising dominion or control over the property) acts to destroy or impair the land's usefulness. In *Mattoon v. City of Norman*, 1980 OK 137, 617 P.2d 1347, plaintiff alleged that the city's adoption of a flood plain ordinance which prohibited all but a few limited uses of land along certain tributaries amounted to a taking without just compensation. Specifically, plaintiff asserted that the city was reserving certain properties for drainage purposes which would not have been necessary had city properly maintained its drainage channels. The Oklahoma Supreme Court reversed the trial court's grant of the city's demurrer and remanded the case with directions to reinstate plaintiff's action because the question of substantial interference is one for the fact-finder.

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[2](...continued)
Enterprises, Inc. v. City of Trenton, 343 A.2d 408 (N.J. 1975); *Gaughen v. Commonwealth Department of Transportation*, 554 A.2d 7008 (Pa. 1989); and *Matter of Virginia Park*, 328 N.W. 2d 602 (Mich.App. 1983). However, we find that recognizing a third ground of taking, unreasonable delay, would be inconsistent with current Oklahoma law.

¶14 On the other hand, in *Morain v. City of Norman*, 1993 OK 149, 863 P.2d 1246, the trial court found that the city's ordinance for establishing policies, standards and responsibilities for the improvement and operation of drainage channels did not amount to an overt act of dominion and control over plaintiff's property which was periodically flooded. The city subsequently approved a plan for on-site and off-site drainage improvement for the plaintiff's land, a residential development. At trial, although the experts all agreed that the drainage improvements increased water flow to the area, the city's expert stated that the increase was not significant. Further, the evidence supported the fact that the flooding was caused in part by excessive or intense rainfalls. The Oklahoma Supreme court affirmed the trial court's dual findings that the city had not committed an overt act exercising dominion and control over plaintiff's property (use of plaintiff's property was not a necessary part of a public improvement) and the interference was not so substantial so as to "effectively destroy or impair the land's usefulness." *Id.* at 1249.

¶15 Thus, some impairment of the land's usefulness is not enough. There must be substantial impairment resulting from an overt governmental act resulting in an assertion of dominion and control over property. Proposed, but unfulfilled plans to condemn land do not constitute a taking because such plans do not amount to an exercise of dominion and control over the property by the condemning authority and do not prohibit the landowner from exercising dominion and control over his property. *Empire Construction, Inc. v. City of Tulsa*, 512 P.2d 119, 123 (Okla. 1973).

¶16 In the *Empire* case, Tulsa had adopted a master expressway plan but did not institute condemnation proceedings for ten years. Plaintiff's property would have been implicated in the re-alignment and enlargement of Riverside Drive. Tulsa even enacted an ordinance limiting access to streets in the expressway plan area. *Empire* answered "no" to

the question whether "in the absence of an actual invasion of land, or of governmental interference with the owner's right to use the same, may inverse condemnation be maintained?" *Id.* at 121. The *Empire* case referred with approval to *City of Buffalo v. Clement*, 28 N.Y. 2d 241, 269 N.E.2d 895, 321 N.Y. S.2d 345 (1971). In the *Clement* case, the court held that even "protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a 'taking' for there was no appropriation of the property in its accepted legal sense." *Id.* at 903. Diminution in value because of delay, called condemnation blight, is relevant to valuation in the condemnation hearing.[3]

¶17 In the case at hand, the facts as found by the trial court and taken as true, do not support the legal conclusion that a taking occurred. There was no physical invasion of Calhoun's land and there was no regulatory action taken by the City. The City of Durant's proposed plans to condemn Calhoun's property, coupled with delay, does not constitute a taking.[4] As

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[3]The parties ably presented their positions in oral argument. Appellee urged an extension of the law of taking, from its current bases of physical invasion and regulatory taking, to include a third ground, unreasonable delay. Based upon United States and Oklahoma Supreme Court jurisprudence in this area, we decline to extend current Oklahoma law.

[4]In *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the business owner of forest land in eastern Texas voluntarily stopped cutting because of a proposal to condemn the land for park land. Kirby Forest contended that it was effectively deprived of all significant interests associated with ownership long before the Government tendered payment. The United States Supreme Court found, however, that until "title passed to the United States, petitioner was free to make whatever use it pleased of its property...Nor did the Government abridge petitioner's right to sell the land if it wished. It is certainly possible, as petitioner contends, that the initiation of condemnation proceedings, publicized

(continued...)

stated before, where a landowner's possessory rights were not disturbed, eminent domain proceedings may be abandoned without subjecting the condemning authority to an award of damages even after a jury trial and verdict fixing the amount of compensation, but before final judgment. *Board of County Com'rs of Pontotoc County v. Rayburn*, 192 Okl. 624, 138 P.2d 820, 822 (1943). If there is no taking under these circumstances, which would require compensation, then there can be no taking under inverse condemnation under the same circumstances, or where the condemning authority has taken less action. The trial court erred as a matter of law in finding that a taking occurred under these facts.[5]

EMINENT DOMAIN POLICY CONSIDERATIONS

¶18 The Oklahoma Legislature has stated policies at 27 O.S. 1991 §13:

> Any person, acquiring agency or other entity acquiring real property for any public project or program described in Section 9 of this title [acquisition of real property for public use in projects in which federal, state or local funds are used] shall comply with the following policies:
>
> 1. Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.
>
> ***

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[4](...continued)
by the filing of a notice of *lis pendens*, reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking."

[5]*White v. County of Newberry, South Carolina,* 985 F.2d 168, 173 (4th Cir. 1993). (Appellate court may reverse a judgment entered on a jury verdict when the facts presented do not establish, as a matter of law, inverse condemnation).

> 7. In no event shall the time of condemnation be advanced, on negotiations or condemnations and the deposit of funds in court for the use of the owner be deferred, or any other coercive action be taken to compel an agreement on the price to be paid for the property.

¶19 Even if City did not use reasonable effort to acquire the Calhoun property by negotiation expeditiously, or if City tried to coerce an agreement on the price, 27 O.S. 1991 §15 declares that §13 does not create any rights or liabilities and "shall not affect the validity of any property acquisitions by purchase or condemnation." We need not decide whether City's conduct violated the policies expressed in §13 because any such acts of noncompliance create no rights in a landowner nor liabilities in a condemning authority.

¶20 On appeal to this Court, City also contended that (1) the trial court erred when it determined that the highest and best use of the Calhoun property was as a residential development and (2) the trial court erred when it awarded damages based on the valuation of the property as residential, lake front home sites. Because we find that the trial court erred in its determination that a taking, or inverse condemnation occurred, we do not reach City's other propositions of error.

¶21 For the reasons stated, the judgment of the trial court is reversed and the matter is remanded to the trial court with directions to enter judgment in favor of the City of Durant.

REVERSED AND REMANDED.

JOPLIN, J., concurs;

HANSEN, P.J., concurs in result:

I concur with the result under the specific circumstances of this case. However in my view, there may be circumstances where a taking *does* occur absent physical invasion or enactment of regulations that substantially impair the property's usefulness.

Appendix B-1

Filed 5/31/94

IN THE DISTRICT COURT WITHIN
AND FOR BRYAN COUNTY
STATE OF OKLAHOMA

CALHOUN, PLAINTIFFS,

VS No. C-89-485

DURANT, ET AL., DEFENDANTS.

ORDER

On March 2, 1994, this case came on for Nonjury Trial on the issue of whether there has been an inverse condemnation. The parties appeared with their attorneys. Stipulations were entered and testimony taken. The Court then took the matter under advisement to receive briefs and consider the law:

Now, on May 26, 1994, the Court makes the following findings and orders:

In 1967, the Plaintiff Charles Calhoun entered the Durant real estate development business and became involved in, among other ventures, the Twin Oaks Subdivision. In 1974, Plaintiffs purchased the 51 acres involved in this case from Mr. & Mrs. Billy Ray Ragle for the sole purpose of developing and selling rural homesites. During their discussions, Ragle informed Plaintiff of a rumour that Defendant City was interested in building a new city lake somewhere in the area. The parties discussed how this could increase the value of homesites, especially if the property was lakeside. Calhoun did not know about any city lake plan, but was aware of an ASCS plan to build a lake at one of 30 alternative locations, one of these being near this property. Calhoun took possession of the land and began surveying the lots and roads and advertising them for sale as the Lakewood Subdivision.

In 1976, the Defendant City began discussing the possibility of constructing a new water reservoir. Plaintiffs' property was listed as one of several alternative locations. In July 1978, Defendant City issued an interim report of the project listing all of Plaintiffs' 51 acres as part of the lake project. However, the Defendant City had financing problems that had to be resolved before a lake project could begin. On September 26, 1978, Defendant City held an election which resulted in passage of a bond proposal to finance the lake. On October 3, 1978, the City Council passed Resolution No. 1001 which approved an engineering contract with Benham-Blair Assoc. for its construction. When, on June 15, 1979, Defendant City adopted a detailed written land acquisition policy, it was clear that City intended to condemn all of Plaintiffs' land. Negotiations began with many of Plaintiffs' neighbors and some land purchases were consummated. However, Plaintiff was not contacted by the City for another 6 years.

After June 1979, planning, engineering and other work on the project was slow. In 1985, Defendant City realized that additional financing would be necessary to build the project. Another election was held which resulted in passage of an additional sales tax to finance construction. On December 20, 1985, the City finally made its offer to purchase all of Plaintiff's 51 acres. Plaintiffs rejected this offer. Plaintiff testified that, on several occasions, he attempted to get the City to either make another offer, condemn his property, or state that they no longer had an interest in it. He says that their reply was that they were going to condemn, but only after they had completed negotiations with the other landowners.

On March 14, 1989, the City Council passed Resolution No. 1163 authorizing the filing of a condemnation action against any landowner who failed to sign a land sale contract by June 15, 1989. On October 16, 1989, Plaintiffs filed this case alleging that the City had taken his 51 acres by inverse condemnation action. Thereafter, in 1990, Defendant City filed

its own condemnation action seeking condemnation of only 23 acres. The parties agree that the Defendant City sought all of Plaintiffs' property until the 1990 lawsuit was filed. The evidence is not clear as to whether construction had begun prior to the filing of this action; however, the parties agree that there was no increased waterflow over Plaintiffs' land until after the filing.

Testimony at trial indicates that the highest and best use of this property is for residential development, as contemplated by Plaintiff. In addition, Plaintiff testified that after the September 1978 Bond Election was approved, he was unsuccessful in both selling his lots and in obtaining financing for their sale. However, in 1988, he was able to obtain a $35,000 loan secured by a mortgage on the property from Defendant First National Bank.

The Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation. This is echoed by Article II, Sec. 24, of the Oklahoma Constitution which provides in part:

> "Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken..."

However, not every 'taking' is compensable. In *Henthorn v. Oklahoma City*, 453 P.2d 1013 (Okl. 1969), Justice Hodges, writing for the Oklahoma Supreme Court, explained:

> "(Under earlier decisions by this court), to determine if taking had occurred it was necessary to determine if there had been a 'material impairment' as distinguished from a mere inconvenience... We believe the better rule is that there must be a

> substantial interference with the use and enjoyment of the property affected." (Emphasis added)

Also see *Mattoon v. Norman*, 617 P.2d 1347 (Okl. 1980). Where the alleged damages are merely consequential, they cannot be recovered in an inverse condemnation action. *Overholser v. Okla. Interurban Traction Co.*, 119 P. 127.

In *Empire Const. v. City of Tulsa*, 512 P.2d 119 (Okl. 1973), the Court was faced with a case where Tulsa had adopted a Master Expressway Plan which would have enlarged Riverside Drive through Plaintiff's property. This plan was adopted in 1957, but never implemented. In 1967, Plaintiff sued in inverse condemnation alleging that the City's failure to carry out the condemnation had "frozen" his ability to use the land, since its sole use was its potential for commercial development. The Court held that this 'damage' was consequential and not recoverable since the City had taken no overt action to carry out the plan and did nothing to restrict the owner's power of dominion or control over the property or otherwise disturbed his property rights. This same requirement for an overt act was approved in *State ex rel Dept. of Highways v. Cook*, 542 P.2d 1405 (Okl. 1975) where the governmental agency had merely submitted plans to reroute I-44 through part of Plaintiff's land and Plaintiff was upset because he could not get approval from the Highway Department for different driveway access to its business.

In *April v. City of Broken Arrow*, 775 P.2d 1347 (Okl. 1989), the Plaintiff's property was included for potential public use within a City flood control plan. When he applied for a zoning change, City denied his application because of his inclusion in the flood plan. He sued. In denying him relief, the Court found that the City had adopted no ordinance calling for appropriation of his property, nor set aside for public use, nor acquired a property interest in it, nor physically invaded it. The Court stated that:

> "..(the) City's future plans for inclusion of his property for 'potential' public use in a flood control plan would not give rise to a cause of action for inverse condemnation. For as Justice Stewart wrote in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967): 'The Constitution measures a taking of property not by what a State says, or what it intends, but by what it does."

The Court then proceeded to determine whether the Owner had been denied an economically viable use of his land. Because the City's action had neither prevented the most beneficial use of the property nor extinguished a fundamental attribute of ownership, the Court found not substantial interference.

Since these decisions, our Court has followed the rule established by the U.S. Supreme Court in *Penn Cent. Transp. Co. v. New York City*, 98 S.Ct. 2646, 438 U.S. 104, 57 L.Ed.2d 631 (1978) wherein that Court ruled that mere diminution in the value of property alone, does not constitute a taking. *Stewart v. Rood*, 796 P.2d 321 (Okl. 1990). However, diminution in value is one factor that may be considered by a Court in what is an essentially ad hoc factual inquiry. *Loretto v. Teleprompter Manhattan CATV*, 102 S.Ct. 3164, 458 U.S. 419, 73 L.Ed.2d 868 (1982). The Court's analysis may involve a consideration of the character of the government action, its economic impact and its interference with a reasonable investment-backed expectation. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

In this case, the City did more than merely propose future plans to build a lake and take Plaintiff's property—it took unequivocal overt action: It adopted enabling ordinances; it passed two bond and/or tax referendums; it issued bonds and collected taxes to build the project; it signed engineering contracts and paid monies thereon; it approved construction

plans; it approved a written plan to take land owned by the Plaintiffs and others; it negotiated with many of these nearby landowners and purchased surrounding property pursuant to the plan; it directly notified Plaintiffs that it intended to take their land, appraised it and made an offer to buy; it specifically told Plaintiffs that it would condemn their entire 51 acres. Thus, beginning with the passage of the first bond proposal on June 15, 1979, City consistently, constantly and unequivocably undertook every overt action necessary to complete the lake project and take Plaintiffs land—short of actually filing a condemnation action to do so.

Cities have been granted the statutory authority to condemn in the same manner as railroad companies. 27 O.S. Sec. 5. However, in doing so, they must comply with mandatory policies adopted by the Legislature. 27 O.S. Sec. 13 requires:

> 1. Every reasonable effort shall be made to acquire, *expeditiously*, real property by negotiation.
>
> 8. If an interest in real property is to be acquired by exercise of power of eminent domain, formal condemnation proceedings shall be instituted. *The acquiring authority shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.*

The Oklahoma Supreme Court has held that this and other statutory condemnation requirements must be strictly complied with. *Oxley v. Tulsa*, 794 P.2d 742, cert. den. 110 S.Ct. 1128, 493 U.S. 1077, 107 L.Ed.2d 1034 (Okl. 1989). These statutory mandates are to be strictly construed in favor of the landowner. *Stinchcomb v. Oklahoma City*, 198 P. 508 (Okl. 1921).

In this case, despite repeated efforts by Plaintiffs to have the City take some definitive action, the City refused, preferring to stay with their own 14 year timetable for completion of a project begun in 1976. The Court finds this delay unreasonable

and in violation of Section 13's requirement that Cities condemn in an expeditious manner.

The economic impact of City's action is uncontroverted. The highest and best use of the land was for development as rural homesites. By taking overt action to acquire Plaintiff's entire 51 acres, City's action prevented him from selling it and buyers from obtaining homeowner financing in the face of an impending condemnation. Thus, the City's action prevented this owner from making full use of his property—the ability to develop it for rural homesites. *See Althaus v. U.S.*, 7 Cl. Ct. 688 (1985). In effect, City extinguished a fundamental attribute of Plaintiff's ownership—his right to sell property at fair market value for its highest and best use.

The Court finds that the City denied Plaintiff an economically viable use of the land in an unreasonable manner. *Agins v. City of Tiburon*, 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106 (1980). This amounted to a substantial impairment of Plaintiffs' property interest. The Court finds that the City's action amounted to a "taking" in fee of the 23 Acres of property and damage to the remaining 28 acres, and that Plaintiff is entitled to just compensation in inverse condemnation.

While the Court has concluded that a taking occurred prior to the filing of this action, it has not been given sufficient evidence to make a determination as to precisely when that taking occurred. This issue and the issue of damages will be determined at the jury trial of this matter.

The Court recognizes that the issues presented by this case are unique and, therefore, this matter is certified for immediate appeal if Defendant City so desires.

The Clerk is directed to mail a copy of this Order to the parties.

Dated this 26th day of May, 1994.

/s/ Doug Gabbard, II
DISTRICT JUDGE BY ASSIGNMENT

Appendix C-1

Filed 6/8/95

IN THE DISTRICT COURT OF BRYAN COUNTY
STATE OF OKLAHOMA

CHARLES W. CALHOUN and DONNA KAY CALHOUN, husband and wife,	)	
Plaintiffs,	)	
vs.	)	No. C-89-485
THE CITY OF DURANT, an Oklahoma municipality, and FIRST NATIONAL BANK IN DURANT, an Oklahoma corporation,	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

NOW on this 22nd day of May, 1995, the above entitled case comes on for non-jury trial, the Plaintiffs appearing by and through Charles Calhoun and their attorneys, Dan Little, Little, Little, Little, Windel and Coppedge, and the Defendant, City of Durant, appearing by and through Paul Buntz, City Manager, and its attorney, Clyde Stallings. Upon the witnesses being sworn and testimony and evidence presented and after fully considering the facts and the law, THE COURT DOES HEREBY FIND, ORDER, ADJUDGE AND DECREE as follows:

1. The legal description of the entire Calhoun tract involved herein, hereafter sometimes referred to as Tract A, is as follows:

[legal description omitted]

2. The legal description of that portion of Tract A inversely condemned by the City of Durant on a permanent basis, hereafter sometimes referred to as Tract B, is as follows:

[legal description omitted]

3. The legal description of that portion of Tract A inversely condemned by the City of Durant on a temporary basis, hereafter sometimes referred to as Tract C, is described as follows:

[legal description omitted]

4. After prior hearing and trial, this Court heretofore determined on or about May 26, 1994, that the highest and best use and the only economically viable use of the Calhoun property, Tract A, was for a residential homesite subdivision, the findings of fact and conclusions of law set forth in said Order being incorporated herein by reference thereto.

5. The date of taking and inverse condemnation by the City of Durant against Tract A was September 26, 1978, and the fair market value of the Calhoun property, Tract A, as of September 26, 1978, was $2,500.00 per acre.

6. The Plaintiffs are entitled to compensation for that portion of the property inversely condemned on a permanent basis, being Tract B, in the amount of 22.91 acres at the rate of $2,500.00 per acre in the sum of $57.275.00, together with interest beginning September 26, 1978, until paid as allowed by law.

7. The City of Durant did inversely condemn and take the remaining balance of 28.85 acres, being Tract C, beginning on the 26th day of September, 1978, and holding the same until April 11, 1990, at which time the temporary taking and inverse condemnation of the City of Durant did terminate. The Plaintiffs are entitled to receive from the Defendant reasonable compensation for this period of temporary taking and inverse condemnation determined to be the fair return of interest on the

value of said property, Tract C, the value of Tract C at the time of taking being $72,125.00 (28.85 acres x $2,500.00 per acre) and the fair rate of interest determined to be the fluctuating New York Chase Manhattan Prime Rate of Interest during the period of time from September 26, 1978, to April 11, 1990, as set forth in Plaintiffs' Exhibit 52, which is attached hereto and incorporated herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City of Durant owns by reason of inverse condemnation Tract B as heretofore described.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs have money judgment against the City of Durant as set forth above.

Exceptions allowed.

/s/ Doug Gabbard, II
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

/s/ Dan Little
Attorney for Plaintiffs

/s/ Clyde Stallings
Attorney for Defendant

Appendix D-1

Filed 12/18/97

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

CHARLES W. CALHOUN, and DONNA KAY CALHOUN, husband and wife,	)	
Plaintiffs/Appellees,	)	
v.	)	No. 85,802
THE CITY OF DURANT, an Oklahoma municipality,	)	
Defendant/Appellant,	)	
and	)	
THE FIRST NATIONAL BANK IN DURANT,	)	
Defendant.	)	

ORDER GRANTING WRIT OF CERTIORARI

Appellee's Petition for Writ of Certiorari is herewith **GRANTED** to review Court of Civil Appeals opinion promulgated in the above styled and numbered case on May 20th, 1997. Case is submitted to this Court on reviewable issues presented in original briefs.

DONE BY ORDER OF THE SUPREME COURT THIS 18th day of December, 1997.

/s/ Yvonne Kauger
CHIEF JUSTICE

Appendix E-1

Filed 10/8/98

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

CHARLES W. CALHOUN and DONNA K. CALHOUN, husband and wife,	)	
Appellees,	)	
v.	)	No. 85,802
THE CITY OF DURANT, an Oklahoma Municipality,	)	
Appellant,	)	
and	)	
OKLAHOMA MUNICIPAL LEAGUE, INC.,	)	
Intervenor.	)	

ORDER

Writ of Certiorari Withdrawn as Improvidently Granted.

WRIT OF CERTIORARI DENIED.

DONE BY THE SUPREME COURT IN CONFERENCE THIS 8th DAY OF OCTOBER, 1998.

/s/ Yvonne Kauger
CHIEF JUSTICE

KAUGER, C.J., SUMMERS, V.C.J., and LAVENDER, SIMMS, HARGRAVE, WILSON and WATT, JJ., CONCUR.
OPALA, J., DISSENTS.
HODGES, J., NOT PARTICIPATING.